## APPENDIX

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued June 1, 1973

July 17, 1973

Before

Hon. WIN G. KNOCH, *Senior Circuit Judge*

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. JOHN PAUL STEVENS, *Circuit Judge*

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| RICHARD K. LEAS, *Plaintiff-Appellant,* vs. No. 72-1615 KENNETH E. SHERER, *Defendant-Appellee.* | Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 70 C 715 James E. Noland, Judge. |

**ORDER**

The plaintiff-appellant, Richard K. Leas, has appealed from a decision of the District Court granting motion for summary judgment in favor of the defendant on the ground that plaintiff's action for malpractice, filed December 14, 1970, is barred by the Indiana Statute of Limitations, Burns Indiana Statutes, § 2-627, which provides:

> **MALPRACTICE—Limitation of actions.—No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complained of.**

Plaintiff argues that as applied to his case this statute is unconstitutional because the incident giving rise to his action occurred on September 7, 1966, but was not discovered until December 15, 1968, when a hemostat which had been left in his abdomen during surgery performed by defendant-appellee Kenneth E. Sherer was removed by another surgeon.

The impact of this harsh statute has been somewhat lessened in cases where there has been fraudulent concealment of the wrong in a particular specified manner. See *Guy v. Schuldt* 1956, 236 Ind. 101, 109, 138 NE2d 891, 895, where because of the fiduciary relationship between the physician and his patient, fraudulent concealment was presumed while the relationship continued.

Plaintiff seeks to bring his case within this narrow exception. He seeks a contested issue of fact as to whether the relationship between him and the defendant did not continue so as to bring the filing of this action within the two year period of the cessation of that relationship. Plaintiff argues here that the defendant had a continuing duty to remove the hemostat and that the statute did not begin to run until it was actually removed by another surgeon, or, as contended below, after plaintiff was again examined by defendant on December 22, 1968. Defendant had not

seen the plaintiff since his leaving the hospital after the initial surgery on November 8, 1966.

The District Court held, and we agree, that the relationship as a matter of law had terminated. Plaintiff had never visited the defendant prior to the operation and after the post operative visits did not return. When trouble arose, he consulted another physician. The District Court properly held that the clear meaning of the statute could not be frustrated by merely returning for a visit at a much later date.

Plaintiff argues that the trend is toward tolling statutes of limitations until the cause of the action is discovered or should have been discovered, citing cases to support that view. We must, however, apply the law of the State of Indiana, *Erie R. Co. v. Tompkins,* 1938, 304 U.S. 64.

Even if theirs is the minority rule at the present time, the statute has been construed by Indiana Courts and has been construed strictly. See *Guy v. Schuldt,* supra; *Ostojic v. Brueckman,* 7 Cir., 1968, 405 F. 2d 302; *Blank v. Community Hospital,* 1968, 143 Ind. App. 333, 337, 240 NE2d 562, 564, rehrg. den., *Chaffin v. Nicosia,* June 27, 1973, —— Ind. App. ——, 297 WE(2) 904.

Indiana is not alone in applying a strict construction to statutes of this type and resolving the charge of unconstitutionality adversely to plaintiff. Similar language in Missouri's malpractice statute, Mo. Rev. Stat. § 516.140, 1959, has been similarly applied in *Laughlin v. Forgrave,* 1968, Supreme Court of Missouri, sitting en banc, 432 S.W. 2d 308, 314, rehrg. den., despite the fact that the plaintiff there could not have known of the foreign object left in her lower back during surgery until later surgery, after the statute had run, disclosed its presence. Similar holdings occurred in *Reistad v. Manz,* 1960, 11 Wis. 2d 155, 159, 105 NW 2d

324, 325-6 where the statute required that written notice be served on malpractice defendants within two years of the event causing damage, and in *Clark v. Gulesian*, 1 Cir., 1970, 429 F. 2d 405, 406, cert. den., 1971, 400 U.S. 993, dealing with a Maine statute. The First Circuit noted that although state courts differed in their approach to the question of when the cause of action accrued, no majority opinion based its decision on constitutional grounds, and pointed out that this was a policy question for the legislature which might reasonably recognize that a defendant has an interest in repose and avoidance of stale claims, however free from fault might be the plaintiff's delay.

The decision of the District Court is affirmed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 21, 1973

Before

Hon. WIN G. KNOCH, *Senior Circuit Judge*

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. JOHN PAUL STEVENS, *Circuit Judge*

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|---|---|
| RICHARD K. LEAS, *Plaintiff-Appellant,* vs. KENNETH E. SHERER, M.D., *Defendant-Appellee.* | Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. |
| No. 72-1615 | No. IP 70 C 715 |

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

(Sixty days up October 20. Pet. to transfer.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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| RICHARD K. LEAS, | ) | |
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| vs | ) | IP 70 C 715 |
| | ) | |
| KENNETH E. SHERER, M.D., and REID MEMORIAL HOSPITAL, INC. | ) | |

**ORDER**

The above entitled cause is before the Court upon defendant Sherer's Motion for Summary Judgment. Whereupon the Court, now being duly advised in the premises, hereby makes the following rulings:

1. Defendant Sherer's motion for summary judgment is GRANTED.

2. Defendant Sherer is DISMISSED from this cause.

IT IS ORDERED that said rulings be entered accordingly.

DATED this 24th day of May, 1972.

/s/ JAMES E. NOLAND

JAMES E. NOLAND,
U. S. DISTRICT JUDGE

**MEMORANDUM OPINION**

This is a medical malpractice case in which the defendant Sherer has raised the statute of limitations as a bar to recovery. The relevant dates are the following: (1) plaintiff

underwent surgery to remove his spleen on September 7, 1966, the surgery being performed by defendants; (2) post-surgery observation was concluded November 8, 1966; (3) plaintiff underwent surgery in Tennessee on December 15, 1968, wherein a hemostat was discovered and removed from his body; (4) plaintiff again consulted with defendant Sherer on December 22, 1968, concerning his recovery; (5) plaintiff filed this action on December 14, 1970. The problem presented here is a determination of when the statute of limitations began to run; defendant argues that the statute began running at (1) or (2) while plaintiff asserts that it began running at (3).

Defendant's motion is based upon Burns Indiana Statutes, § 2-627:

> "Malpractice—Limitation of action—No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced, or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complained of."

As this statute has been strictly construed in *Guy v. Schuldt,* 138 NE2d 891 (1956) and *Ostojic v. Brueckman,* 405 F. 2d 302 (7th Cir., 1968), defendant feels he is entitled to summary judgment. This Court agrees.

Plaintiff makes three arguments in opposition to defendant's motion: (1) the problem of whether plaintiff's final visit to defendant's office represented a continuation of the physician-patient relationship is a material question of fact which must be decided by the jury; (2) the strict

interpretation of the statute as per *Guy* and *Ostojic* is no longer the law of this state in view of the recent trend toward the "discovery" rule; (3) any statute of limitations not based upon the "discovery" rule or other standard which operates in a similar vein violates Article I, § 12 of the Indiana Constitution. The Court will briefly address itself to each of these arguments.

Plaintiff's first argument is based upon the sole exception to § 2-627 that was carved out by the Supreme Court in *Guy v. Schuldt*. Where a doctor continues the physician-patient relationship and conceals his wrongdoing, the Court will find a continuing duty of disclosure which tolls the running of the statute of limitations. The duty of disclosure ends when the physician-patient relationship ends, the signal for the statute to begin running. Plaintiff contends that his late visit to the doctor could be construed as evidence of a continuing relationship; this Court holds that, as a matter of law, it could not. Plaintiff had never visited this doctor before his operation and it is clear that he did not consider the relationship to be continuing; following his post-operative visits, he did not visit the doctor again. When further trouble arose, plaintiff visited another doctor. Likewise, this Court rejects plaintiff's argument on policy grounds. It is not for the courts to frustrate or subvert a legislative mandate by allowing a patient to reopen his statute of limitations by merely returning to the doctor for a short visit at a much later date. It was the clear intent of the parties that the transaction entered into in 1966 was completed.

Plaintiff's second argument is that the Indiana interpretation of its malpractice statute of limitations is both outmoded and out of step with the law. According to *Guy v.*

*Schuldt*, supra, a plaintiff could lose his right to sue without his ever knowing it existed where the symptoms of malpractice took more than two years to surface and be diagnosed. At the time *Guy* was decided, it was in step with the majority of jurisdictions. The minority rule, the law in four states in 1956, is the so-called "discovery" rule where the statute does not start running until the patient discovers or should have discovered the negligence. Plaintiff adroitly points out that twenty-two states have adopted the discovery rule since 1960; plaintiff cites the states and cases. Plaintiff's argument must fail on this point also, however. This argument has been attempted within recent years in *Ostojic v. Brueckman*, supra, and *Blank v. Community Hospital*, 240 NE2d 562 (1968), cases which have recently supported the *Guy* position as expounded by now Chief Justice Arterburn. The cases cited by plaintiff show a trend in the law with which Indiana is out of step; all of the cases cited by plaintiff are state Supreme Court cases, however, not rulings by federal courts. It is the duty of the federal courts to apply the law as it is handed down from the states; any change as basic as that proposed by plaintiff should come from the state court system, not from the federal courts where it would be unreviewable. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938).

Plaintiff's third contention is that the *Guy* position violates Article I, § 12 of the Indiana Constitution which holds that the courts shall be open to every man for redress. This argument is but an extension of the "discovery" rule argument and suffers many of its informities. The Indiana Supreme Court has implicitly rejected this position; it is not for this Court to change state law.

Cases decided upon the statute of limitations often seem unjust. The Indiana General Assembly has determined, however, that justice can be done only when causes are filed within a specified time. It is the duty of this Court to uphold this mandate.

/s/ JAMES E. NOLAND

JAMES E. NOLAND,
U. S. DISTRICT JUDGE

DATE: May 24, 1972